

No. 2437.

IN THE
**UNITED STATES CIRCUIT
COURT OF APPEALS**

FOR THE
NINTH CIRCUIT

UTAH IMPLEMENT-VEHICLE COMPANY, A CORPORATION,
Appellee,

vs.

D. W. STANDROD & COMPANY, A CORPORATION, AS TRUSTEE
FOR IDAHO LUMBER COMPANY, LTD., AND GEO. A.
LOWE COMPANY,
Appellant.

Motion to Dismiss Appeal

*Appeal from the United States District Court for the
District of Idaho, Eastern Division.*

CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

Filed.....**Filed**....., 1915.

.....**JAN 21 1915**.....Clerk.

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MOTION TO DISMISS APPEAL.

Comes now the above named appellee, Utah Implement-Vehicle Company, and moves the Court to dismiss the appeal of the appellant D. W. Standrod & Company, as Trustee for The Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, for the following reasons:

1. The said appellant waived any and all right of appeal from the decree rendered and entered in the lower Court in the above entitled action by its withdrawal of the sum of four thousand six hundred sixteen and 58-100 dollars (\$4,616.58) from the clerk of the lower Court, being a part of the proceeds of sale of the property in which the said appellant was interested under the said decree and being the amount due at the time of the sale of said property to the said appellant under the decree sought to ^{be} ~~me~~ appealed from.

2. The appellant, D. W. Standrod & Company, as Trustee, is a party to this action, as Trustee for Idaho Lumber Company, Ltd., Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers, and as such filed its answer in said action in the lower Court, and as such Trustee for said parties it was awarded a first lien upon the property in Shelley, Idaho, in which it was interested, while the appeal in this action is taken by the said D. W. Standrod & Company as Trustee for Idaho Lumber Company, Ltd., and Geo. A. Lowe Company. While a severance was granted by the lower Court for the purposes of this appeal, such severance was improper and not permissible.

3. No citation on appeal was issued in this action as to the defendant Frank C. Bowman, as Trustee in bankruptcy of the estate of N. C. Mickelson, a bankrupt, nor was any service of notice of appeal or of citation had upon the said defendant Frank C. Bowman, as such Trustee.

STATEMENT OF FACTS.

The foregoing motion is based upon the following facts appearing in the transcript of record of this action:

This action was instituted by the Utah Implement-Vehicle Company, for the purpose of foreclosing a mortgage upon certain real estate situate in Shelley, Idaho, and certain farm lands situate in Bingham County, Idaho, near Shelley, Idaho, belonging at the time of trial to Frank C. Bowman, as Trustee in bankruptcy of the estate of N. C. Mickelson, a bankrupt. The mortgage was given by N. C. Mickelson prior to his bankruptcy. Prior to the commencement of this action a number of actions were instituted in the District Court of Bingham County, Idaho, for the foreclosure of a mortgage held by E. E. Rodgers and F. C. Rodgers against the property in Shelley, Idaho, and five certain mechanic's liens against said property in favor of Idaho Lumber Company, P. J. Johnson, Geo. A. Lowe Company, D. F. Hagans and Crane Company. Those several actions were consolidated and proceeded to decree without the Utah Implement-Vehicle Company being made a party to any of such suits, and the property was sold under the decree to D. W. Standrod & Company, as Trustee for Idaho Lumber Company, Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers. The proceeds of the sale were sufficient to satisfy the Hagans and Johnson liens and they were paid, together with the costs of Court and the sale costs, out of the proceeds of the sale of the property, while the liens of the Idaho Lumber Company, Geo. A. Lowe Company and the Rodgers mortgage lien were satisfied by the taking of title in the name of their Trustee. The Hagans and Johnson liens and the costs were paid pro rata by Idaho Lumber Company, Geo. A. Lowe Company and E. E. Rodgers and F. C. Rodgers.

This action proceeded to trial and a decree was entered awarding D. W. Standrod & Company, as Trustee for Idaho Lumber Company, Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers, a first lien upon the property in Shelley, Idaho, for an amount found due under the Rodgers mortgage, together with an attorney's fee of three hundred dollars (\$300.00) for the foreclosure thereof in this action, and the taxes found to have been advanced by the Trustee after it had purchased the property, and a second lien to the Utah Implement-Vehicle Company for the amount found due under its mortgage, and the property was ordered sold to satisfy such liens in their order of priority as fixed in the decree. Such decree provides that all the interests of all of the defendants in the property should pass by such sale.

An order of sale was issued under the decree in this action to the master appointed in the decree, and the property was sold to Utah Implement-Vehicle Company for the sum of eight thousand dollars (\$8,000.00), and the purchaser paid in cash an amount sufficient to satisfy the first lien awarded to D. W. Standrod & Company, as Trustee for Idaho Lumber Company, Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers, and that amount was paid by the master to the clerk of the lower Court. Afterwards, the sale was confirmed and the money in the hands of the clerk ordered paid to D. W. Standrod & Company, as Trustee, and thereafter and prior to any steps being taken for an appeal in this action, D. W. Standrod & Company, as Trustee, through one of its attorneys of record in this action, received from the clerk the said sum of four thousand six hundred sixteen and 58-100 dollars (\$4,616.58).

After notice, the defendant Frank C. Bowman, as Trustee, and E. E. Rodgers and F. C. Rodgers, refused to join in an appeal from the decree in this action and

waived any right of appeal therefrom and thereupon the lower Court granted a severance and this appeal is prosecuted by D. W. Standrod & Company, as Trustee for Idaho Lumber Company and Geo. A. Lowe Company. The citation is not directed to D. W. Standrod & Company, as Trustee for E. E. Rodgers and F. C. Rodgers, nor Frank C. Bowman, as Trustee, nor was any notice of appeal served upon D. W. Standrod & Company, as Trustee for E. E. Rodgers and F. C. Rodgers, nor upon Frank C. Bowman, as Trustee for M. C. Mickelson, a bankrupt.

The plaintiff, Utah Implement-Vehicle Company, was awarded a first lien upon the farm land covered by its mortgage and that property was also sold under the decree and bought in by the plaintiff.

CLENCY ST. CLAIR,

CHARLES C. ST. CLAIR,

Attorneys for Appellee,

Utah Implement-Vehicle Company

NOTICE.

To Appellant D. W. Standrod & Company, as Trustee for Idaho Lumber Company and Geo. A. Lowe Company, and William A. Lee, its Attorney.

You are hereby notified that the foregoing motion will be called for hearing by the undersigned, before the United States Circuit Court of Appeals for the Ninth Circuit in the Court room of said Court, Room No. 326 in the United States Courthouse and Post Office building, N. E. Cor. 7th & Mission streets, San Francisco, California, on the . . . 11th . . . day of . . . *February* . . ., 1915, at the opening of the Court on said day, or as soon thereafter as counsel can be heard, and the said motion heard at that time, the said Court permitting.

Service of copy of foregoing motion and notice admitted this..... day of *February*, 191*5*

CLENCY ST. CLAIR,

CHARLES C. ST. CLAIR,

Attorneys for Appellant,

Utah Implement-Vehicle Company.

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Attorneys for Appellee,

D. W. Standrod & Company, as Trustee for Idaho Lumber Company and Geo. A. Lowe Company.

